SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

EISENBERG FARM PRODUCTS, A PENNSYLVANIA CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

GUY K. BARD,
Attorney General of Pennsylvania;
HARRY POLIKOFF,
Deputy Attorney General,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania under date of June 30, 1938, upon which order said court refused rehearing and reargument July 25, 1938.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported in 200 Atlantic 754; and also appears in the record of the present proceedings (R. 284). This opinion, entered June 30, 1938, affirms the decree entered by the Court of

Common Pleas of Dauphin County; the opinions of the latter court are unreported at present; they appear in the record of the present proceedings (R. 15, 26).

Jurisdiction.

The order of the court below, the Supreme Court of Pennsylvania, was entered June 30, 1938. A petition for reargument and rehearing filed in said court was denied July 25, 1938. By orders entered July 29 and September 1, 1938, the record of the court below is being held therein pending the outcome of the instant petition.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended; 28 U. S. C., Sec. 344 (b).

Question Presented.

May a State statute regulating the milk industry by requiring that all milk dealers obtain a license, file a bond for the protection of farmers, and pay to farmers minimum prices prescribed by an administrative agency (or any one of said requirements) be enforced against a milk dealer buying milk at its plant within the State from farmers located therein for shipment to another State?

Statute Involved.

The Milk Control Law of the Commonwealth of Pennsylvania, enacted April 28, 1937, P. L. 417 continues in full force and effect (Section 1203) all proceedings commenced under laws repealed thereby, which laws include the Milk Control Board Law, approved April 30, 1935, P. L. 96 (31 P. S. Sec. 684). The present proceedings were commenced under the Act of 1935; although there is some change in the wording of the later law the present case is not affected by such change of wording, and no question has ever been raised in this connection. Section 3 of the Act of 1935 defines a milk dealer as follows:

"'Milk Dealer' means any person, including any store, as hereinafter defined, who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture within or without the Commonwealth."

Section 10-A provides as follows with respect to licensing:

"Except as herein otherwise specifically provided, a milk dealer, as defined in this act, shall not buy milk from producers or others within this Commonwealth for storage, manufacture, processing, distribution, or sale within or without this Commonwealth, or sell or distribute milk within this Commonwealth, unless such dealer be duly licensed as herein provided; * * *"

Section 12-A provides as follows with respect to bonding:

"Except as otherwise specifically provided in this act, a license shall not be issued to a milk dealer purchasing milk from producers within this Commonwealth unless the milk dealer shall execute and file with the application a personal bond approved by the board. * * *"

Section 18 provides as follows (*inter alia*) with respect to milk prices:

"The board, after making the examination or investigation provided by this section, shall, with the approval of the Governor, fix, by official order, the minimum prices to be paid by milk dealers to producers and others for milk: Provided, however, That the fixing of prices to be paid to producers for milk to be used solely in manufacturing shall be discretionary with the board. * * *

"It shall be unlawful for any milk dealer to sell any milk for which he has paid, or agreed to pay, in the Commonwealth of Pennsylvania, a price lower than that fixed by the board for milk of that class or grade, taking into consideration a proper allowance for the cost of the transportation of such milk."

Statement of Facts.

The facts in the present case, as admitted by both parties, and as determined by the Chancellor below, are as follows:

The plaintiff is the Milk Control Board of the Commonwealth of Pennsylvania, to which the Milk Control Commission is the statutory successor. The defendant is a milk dealer, a Pennsylvania corporation, which leases and operates a milk receiving plant in Elizabethville, Dauphin County, Pennsylvania (R. 16). At this plant the defendant buys milk from approximately 175 farmers in the surrounding section of Pennsylvania, who bring their milk to the plant in their individual cans. At the plant this milk is weighed and tested by the defendant, then dumped into large receiving tanks, wherein the milk is accumulated and cooled for the purpose of shipment (R. 16). This requires retention of the milk for less than twenty-four hours; the milk is transferred from the cooling tanks to tank trucks and is shipped into New York City for resale in said city by these tank trucks operated for defendant, the journey of said trucks being continuous from Elizabethville, Pennsylvania, to New York (R. 16). The milk is not processed in any other manner, and the cooling involved does not change the milk or its constituent parts. All of the milk thus purchased by the defendant is shipped to and resold in New York; none is sold by the defendant in Pennsylvania (R. 16). The defendant has been doing business in this manner for a period of more than three years.

Approximately 4,500,000,000 pounds of milk were produced in Pennsylvania in 1934, of which approximately 470,000,000 were shipped out of the State (R. 17). The plaintiff Board, in applying the above statutory provisions to all milk dealers in Pennsylvania, also required the defendant to (1) obtain a license as a milk dealer; (2) post

a bond conditioned for the payment of milk purchased from producers; and (3) pay to farmers the minimum milk prices prescribed by the Board (R. 17). With these requirements the defendant refused to comply upon the ground that it was engaged in interstate commerce and therefore not subject to the statute involved. Therefore the plaintiff filed a bill of complaint to restrain the defendant from doing business as a milk dealer contrary to the above statutory provisions. The Chancellor entered a decree *nisi* in favor of the defendant and against the plaintiff upon August 23, 1937 (R. 24). Exceptions thereto were dismissed by the county court en banc December 7, 1937, and the bill dismissed (R. 31). This decision was affirmed by the Supreme Court of Pennsylvania June 30, 1938 (R. 33).

Basis of Decisions Below.

The Court of Common Pleas of Dauphin County dismissed the bill of complaint mainly upon authority of *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (1921), and *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189 (1924), entering a decree *nisi*. Exceptions to the decree *nisi* were then dismissed by the county court en banc, in a second opinion to the same effect, distinguishing *Townsend* v. *Yeomans*, 301 U. S. 447 (1936). A final decree was entered for the defendant.

The decree of the court of common pleas was affirmed by the Supreme Court of Pennsylvania. The opinion of that court, written by Mr. Chief Justice Kephart, first determined that the (1) licensing, (2) bonding and (3) minimum price provisions of the statute involved were constitutional as a valid exercise of the State police power. After reaching this conclusion that court held that it was "controlled" by the decision of this Court in *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927), and similar cases, notwithstanding that "We have felt, and still feel, that State laws

regulating transactions incidental to interstate commerce, but designed to protect the health, safety, or welfare of the public, are proper State regulation where the transaction which is the origin and beginning of the commerce, is peculiarly within the State's domain".

Specification of Errors to be Urged.

1. The Supreme Court of Pennsylvania erred in holding that decisions of this Court compelled the conclusion that enforcement of the Milk Control Law of Pennsylvania against the defendant violated the interstate commerce clause of the Constitution of the United States.

2. The Supreme Court of Pennsylvania erred in sustaining the decree dismissing the bill of complaint brought against the defendant to restrain it from doing business in violation of the Milk Control Law of Pennsylvania, Act of April 30, 1935, P. L. 96.

Reasons for Granting the Petition.

1. The present case is on all fours with earlier decisions of this Court, a line of authorities extending from *Munn* v. *Illinois*, 94 U. S. 113 (1876), to *Townsend* v. *Yeomans*, 301 U. S. 447 (1936). The principle of these cases is that a statute enacted within the State police power and applied alike to intrastate and interstate commerce, in matters admitting of diversity of treatment according to local conditions, does not contravene the interstate commerce clause until it is superseded by valid Federal regulation.

2. The Supreme Court of Pennsylvania erred in the conclusion that the instant case is controlled by *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927), and similar cases, because such cases are distinguishable.

3. If the Supreme Court of Pennsylvania correctly relied upon *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927),

reconsideration thereof by this Court at this time is necessary and desirable from a legal, social and economic point of view.

4. If the decision of the court below is the law of the land, the stabilization of the milk industry of the United States by means of milk control legislation will be greatly hindered.

WHEREFORE your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, requiring that court to certify the whole record and the case herein to this Court for its review and determination.

MILK CONTROL COMMISSION OF THE
COMMONWEALTH OF PENNSYLVANIA,
By HOWARD G. EISEMAN,
Chairman, Petitioner;
GUY K. BARD,
Attorney General,
Counsel for Petitioner;
HARRY POLIKOFF,
Deputy Attorney General,
Counsel for Petitioner.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

Guy K. Bard, being duly sworn according to law, deposes and says: I am counsel for the petitioner herein; I have read the within petition and know the contents thereof; all the allegations in the said petition are true to the best of my knowledge, information and belief.

GUY K. BARD.

Sworn and subscribed to before me this 29th day of September, 1938.

(Signed) MISS LUCILLE A. STROUP,
[SEAL.] *Notary Public.*

My Commission expires March 5, 1939.

Certificate of Counsel.

I hereby certify that the foregoing petition is, in my opinion, well founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

GUY K. BARD,
Attorney General.

SUPREME COURT OF THE UNITED STATES

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EISENBERG FARM PRODUCTS, A PENNSYLVANIA CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Specifications of Error.

The Supreme Court of Pennsylvania erred in the following respects:

1. The Supreme Court of Pennsylvania erred in holding that decisions of this Court compelled the conclusion that enforcement of the Milk Control Law of Pennsylvania against the defendant violated the interstate commerce clause of the Constitution of the United States.

2. The Supreme Court of Pennsylvania erred in sustaining the decree dismissing the bill of complaint brought against the defendant to restrain it from doing business in

violation of the Milk Control Law of Pennsylvania, Act of April 30, 1935, P. L. 96.

ARGUMENT.

The petition filed herewith sets forth four reasons for granting the petition, which summarize the arguments herein advanced for granting the writ.

1. Munn v. Illinois, and the many decisions of this Court based thereon, control the instant case.

There can be no essential distinction between dealers or handlers of grain and of milk; the difference, if any, would seem to favor regulation of the perishable commodity, milk. The grain and produce cases, it is submitted, fully control the present case. *Munn* v. *Illinois*, 94 U. S. 113 (1876), and *Cargill* v. *Minnesota*, 180 U. S. 452 (1900), sustained licensing, bonding, and the charge of certain rates by grain handlers, notwithstanding that the statutes so requiring affected grain shipped in interstate commerce. Similarly see *Merchants Exchange* v. *Missouri*, 248 U. S. 365 (1918); *Budd* v. *New York*, 143 U. S. 517 (1891), and *Brass* v. *North Dakota*, 153 U. S. 391 (1893). These cases were cited and discussed at length in *Townsend* v. *Yeomans*, 301 U. S. 447 (1936), wherein this Court unanimously sustained a State statute prescribing maximum charges for the handling and selling of leaf tobacco, notwithstanding that such tobacco was shipped in interstate commerce.

(a) With respect to *licensing*, *Cargill* v. *Minnesota*, 180 U. S. 452 (1900), at 470, held as follows:

> "It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of

the state of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the state between the defendant and the sellers of grain. We do not perceive that in so doing the state has intrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license."

(b) With respect to *bonding* the cases of *Hartford Accident and Indemnity Co.* v. *Illinois,* 298 U. S. 155 (1936), and *Arnold* v. *Hanna,* 276 U. S. 591 (1928), are ample authority in support of the statutory provision now at issue. In the former interstate commerce was squarely involved.

(c) With respect to the requirement that *minimum rates for milk* be paid to producers by milk dealers, the case of *Munn* v. *Illinois,* 94 U. S. 113 (1876), at 134, held as follows:

"The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied."

Similarly, in *Townsend* v. *Yeomans,* 301 U. S. 447 (1936), this Court held as follows in sustaining a Georgia statute fixing maximum charges for handling and selling leaf tobacco:

"The main contention of appellants is that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce. Appellants urge that practically all the tobacco grown in Georgia is shipped out of the State, * * *

* * * * * * *

"We are thus brought to the final contention of appellants that the state law, although not in conflict with any exertion of federal authority, must fall as being

> repugnant to the existence of an exclusive federal power although unexercised. The contention ignores the principle that this ground of invalidity is to be found only with respect to such matters as demand a general system or uniformity of regulation; that in others matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. • • •
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> • • • • • • •
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> "Whatever relation these transactions had to interstate and foreign commerce, the effect is merely incidental and imposes no direct burden upon that commerce. The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid federal regulation. The judgment of the District Court is affirmed."

The county court was misled by a statement in the latter opinion to the effect that the Georgia Act "does not attempt to fix the prices or conditions of purchases"; it is submitted that this statement was made by this Court merely by way of distinguishing that case from another (*Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (1921)), wherein a North Dakota statute arbitrarily and inadequately delegated to a State officer the power to fix prices and profit margins, without prescribing reasonable standards. Of course a statute of such type is not a valid exercise of the State police power, and therefore would constitute a direct interference with interstate commerce. However, in the case at bar the Supreme Court of Pennsylvania has already held the licensing, bonding and price-fixing provisions of the statute to be a valid exercise of the state police power (R. ~~284~~ 32).

Both of the courts below gave too great weight to *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (1921), and *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189 (1924). These cases

appear to be quite a departure from the principles earlier announced by this Court in *Munn* v. *Illinois, supra,* and its successors above cited. However, the *Farmers Grain* cases are correctly distinguished in *Townsend* v. *Yeomans, supra,* upon the ground just described: in those cases the statute exceeded the State police power for the reason above given, and therefore could not be permitted to affect interstate commerce directly or indirectly; no doubt this Court was also influenced by the Federal legislation covering much of the same subject in the State of North Dakota.

The latest expression of this Court upon the subject appears in *South Carolina v. Barnwell Bros.,* 303 U. S. 177 (1938):

> "In each of these cases [police] regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."

In the present case it has never even been hinted that the Commonwealth has endeavored to discriminate against milk dealers handling milk in interstate commerce.

The opinion of the court below is unequivocal to the effect that the (1) licensing, (2) bonding, and (3) minimum price provisions of the Milk Control Law are within the police power of the Commonwealth; it necessarily follows that since the subject matter is obviously one requiring diversity of treatment according to local conditions, the State may act in a non-discriminatory manner with respect thereto until Congress sees fit to act.

2. Di Santo v. Pennsylvania and like cases, relied upon by the court below, are distinguishable from the instant case.

The Supreme Court of Pennsylvania held that the instant case was controlled by *Di Santo* v. *Pennsylvania,* 273 U. S.

34 (1927). However, this case merely involved the validity of a statute requiring licenses to sell steamship tickets to or from foreign countries. This necessarily involved regulation of foreign commerce and foreign commerce only, the type of discriminatory legislation condemned by this Court as recently as *South Carolina* v. *Barnwell Bros., supra.* The majority opinion in the *Di Santo* case held that it was controlled by *Texas Transport & Terminal Co.* v. *New Orleans,* 264 U. S. 150 (1924), and *McCall* v. *California,* 136 U. S. 104 (1889), yet both of the latter cases were tax cases, wherein appears not the slightest discussion of State police power (and both cases were decided by a divided court).

In the case at bar the legislation constitutes no effort to regulate only milk dealers in interstate commerce; therefore it is entirely distinguishable from the *Di Santo* case. Furthermore, in the case at bar it has never been contended that the license fee constitutes a tax, and it in fact is not a revenue producing measure; therefore it is entirely distinguishable from the *Texas Transport* and *McCall* cases.

It is interesting to observe that the majority opinion in the *Di Santo* case also relies upon *Shafer* v. *Farmers' Grain Co.,* 268 U. S. 189 (1924), wherein the opinion shows that counsel expressly "conceded" that the statute was "designed" to affect interstate commerce. In the instant case no such contention has ever been raised because the statute is obviously a general regulation of the entire milk industry of Pennsylvania, only 10% of which (R. 17) involves the handling of milk in interstate commerce. This case is more fully distinguished above, pages 12-13.

It is submitted that the instant case is controlled not by the *Di Santo* decision (and by those cases upon which it is based), but rather by *Munn* v. *Illinois* and the line of authorities succeeding it.

3. Di Santo v. Pennsylvania should be reconsidered by this Court, if the case is applicable hereto.

If the Supreme Court of Pennsylvania correctly relied upon *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927), reconsideration thereof by this Court at this time is necessary and desirable from a legal, social and economic point of view. It was decided by a divided court, Mr. Justice Brandeis, Mr. Justice Stone and the late Mr. Justice Holmes dissenting. The opinion of the majority was in turn based upon cases decided by a divided court, including *McCall* v. *California*, 136 U. S. 104 (1889), of which Mr. Justice Brandeis, dissenting, asked "disregard" because this "would involve merely refusal to repeat an error once made" (273 U. S. 34, at 41). In *Di Santo* v. *Pennsylvania*, *supra*, this Court reversed the Supreme Court of Pennsylvania, the opinion of which appears in 285 Pa. 1 (1923); and yet in the instant case the Supreme Court of Pennsylvania reasserts belief in its original opinion, stating, "We have felt, and still feel that" the present type of police regulation is "peculiarly within the state's domain".

Since the decisions of this Court in the *Di Santo* and *Farmers' Grain* cases, many changes have taken place. There has come a recognition that the lives of the citizens of the United States are not limited by the boundaries of the States wherein they reside; that activities in one State often necessarily affect activities in another. Especially is this true in the milk industry, wherein "milksheds" have developed according to natural markets rather than according to State lines. Yet the problem is not national in scope because every milkshed has its own problems. Since the decision of the above cases a pronounced change has occurred in the fields of legal and governmental thought, arising from recognition that many problems of human endeavor cannot be aided or solved except by action which

accepts that State lines must be crossed. Is the only alternative intervention by the Federal Government? Under the *Di Santo* case the answer is in the affirmative; but under *Munn* v. *Illinois* and its succeeding cases, the answer is simply that the State may act until Congress sees fit.

It is submitted that the interstate commerce clause was never intended to compel Federal action—or none at all—in police regulation of the type herein involved. Rather, the realities of life under today's conditions compel the conclusion that the dissenting opinion in the *Di Santo* case was sound. Changed economic conditions cause modern legal thinking in the instant situation to transcend State lines without necessarily commanding Federal intervention. The *Di Santo* case is of particularly questionable authority today in view of *Townsend* v. *Yeomans* and *South Carolina* v. *Barnwell Bros., supra.*

4. The position of the court below hinders stabilization of the milk industry of the United States, to the detriment of dairy farmers and the consuming public.

If the decision of the court below is the law of the land, the stabilization of the milk industry of the United States by means of milk control legislation will be greatly hindered. At least twenty States (practically all the dairy States) today have upon their statute books legislation of the necessary type involved in the instant case. Milk dealers in any State may evade all regulation by simply purchasing their milk in other States, thus creating an area without law, to the detriment of dairy farmers and the consuming public.

For example, milk dealers in any State may purchase milk within the State under their own conditions and at their own price, merely because such milk is sold outside the State—notwithstanding that it is bought at their plants in the State. The effect of this conduct is not only to break

down the price structure of the farmers in the State shipping to these milk dealers but also to create an unfair competitive condition adversely affecting the milk dealers doing intrastate business. Furthermore, the farmers and dealers in the other State to which the milk is finally shipped are also unfairly affected by "cut price" milk.

It is a matter of common knowledge that milk dealers with no assets in the State are able to, and do, in accordance with the custom of the trade, buy their milk on credit; if required to post neither license nor bond they would have the farmers at their mercy (*Rohrer v. Milk Control Board*, 322 Pa. 257 (1936)). See *Nebbia* v. *New York*, 291 U. S. 502 (1934) at 522, 538.

As stated above, only 10% of the milk produced in Pennsylvania is shipped to other States; yet it is common knowledge that the malpractices of a minority can disrupt an entire industry. It is impossible to maintain fair dealings in an industry within a State for the benefit of the inhabitants of the State, if here and there a milk dealer can create an area without law merely because he ultimately resells the milk in some other State. Such "no-man's-land" is increasing in area, not only within the Commonwealth of Pennsylvania but within all other States with milk control legislation, as milk dealers come more and more to realize that by crossing a State line they can evade all regulation, at least until the Federal Government sees fit to act.

It is important to note that if the position of your petitioner is sustained by this Court it will be possible for the twenty States with milk control legislation to perfect a veritable network in their stabilization efforts, because the State in which the milk is both produced and purchased will have jurisdiction to regulate. Thus we will have the converse of the situation of *Baldwin* v. *Seelig*, 294 U. S. 511 (1935). There it was held that the State of New York can-

not fix the price to be paid by New York milk dealers to Vermont farmers for milk sold in New York which has been produced and purchased in Vermont. This, of course, is a proper decision and simply means, as applied to the present case, that New York cannot impose upon the defendant in this case, purchasing milk in Pennsylvania, the kind of regulation which Pennsylvania is seeking to enforce. Therefore, the Commonwealth of Pennsylvania instituted the present action and it is submitted that it properly (rather than New York) has jurisdiction over the conduct of the defendant.

Conclusion.

It is respectfully submitted that the Supreme Court of Pennsylvania erred in failing to base its decision upon cases of this Court squarely controlling the instant case; that the decisions of this Court relied upon by the Supreme Court of Pennsylvania are distinguishable, and of doubtful authority today in view of very recent decisions by this Court, and in view of the trend of judicial thought arising out of changed economic conditions; that the position of the court below is detrimental to the dairy industry of the United States; that therefore a writ of certiorari should issue in order that the present questions may be reviewed by this Honorable Court.

Respectfully submitted,

GUY K. BARD,
Attorney General;
HARRY POLIKOFF,
Deputy Attorney General,
Counsel for Petitioner.